No. 76-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION

SUPPLEMENTAL MEMORANDUM OF PETITIONER TRANSCONTINENTAL GAS PIPE LINE CORPORATION

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In its memorandum to this Court in response to the petition for certiorari, the Federal Energy Regulatory Commission (at that time known as the Federal Power Commission) requested that this case be held in abeyance pending the decision of the United States Court of Appeals for the District of Columbia Circuit in *Elizabethtown Gas Company* v. *Federal Energy Regulatory Commission,* No. 76-1465. Because the *Elizabethtown* case presented the identical question on the merits as was presented to the same court of appeals in the instant case, petitioner Transcontinental Gas Pipe Line Corporation (Transco) acqui-

esced in the Commission's request and this Court has not yet acted upon the petition.

The decision of the court of appeals in *Elizabethtown* was rendered on January 26, 1978 and, while the Commission has committed itself to filing a supplemental memorandum, petitioner Transco also wishes to express its view of the interrelationship of *Elizabethtown* to this case.[1]

1. The issue presented to the court of appeals in *Elizabethtown* was exactly the same as the issue presented to another panel of the same court in the instant case, namely, the legality of a compensation scheme for unequal curtailment of natural gas supply. In *Elizabethtown,* the court had no difficulty in deciding the case on its merits despite the fact that there was no evidence relating to the pipeline's gas supply. In the instant case, however, the court of appeals has three times refused to decide the case on its merits. Instead, on an issue which only it has raised, it has thrice remanded the case to the Commission with various directions to undertake gas supply inquiries. The first time, this Court summarily reversed the court of appeals' action upon a petition filed by the Commission. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation,* 423 U.S. 326 (1976). The second time, the Commission attempted to comply with the court of appeals' mandate "to determine whether a real shortage exists"[2] by certifying to the reality of the shortage based upon record evidence and the stipulation of the parties. This did not satisfy

[1] The lower court's decision in *Elizabethtown* is attached hereto as Appendix A.

[2] Order of February 6, 1976, Appendix E to the petition herein.

the court of appeals, however, and the third remand ensued. It is this third remand, with its instruction to the Commission to determine the "duration, shape and causation" of the shortage on Transco's system, which is the subject of the petition in this case.

What the court of appeals found to be "absolutely essential"[3] to a decision on the merits in this case, was of no concern to a different panel of the same court in *Elizabethtown.* Indeed, the panel in *Elizabethtown,* while determining "the issue on the merits to be relatively simple", showed full awareness of the inconsistent posture and treatment of the *Transco* case and made no effort to distinguish the two cases (Appendix A, pp. 4a, 10a-12a).[4] Transco submits that there is no basis for distinguishing the cases; rather, to paraphrase the words of this Court in the prior chapter, 423 U.S. 326 at 334, it is no longer "conceivable" that any nexus exists between the lawfulness of compensation and the extent of the gas shortage.

2. In its memorandum to this Court, the Commission agreed with Transco that the court of appeals once again seriously overstepped the proper bounds of judicial review by dictating to the administrative agency the type of gas supply investigation which it must undertake. Moreover, while the Commission did not object to granting Transco's petition, it did not itself seek a writ of certiorari because the instant

[3] *Id.*

[4] The opinion in *Elizabethtown* was written by Judge Leventhal who was one of the four judges voting to deny rehearing *en banc* in this case in a 4-4 split. In order to be consistent with his action in *Elizabethtown*, Judge Leventhal today would unquestionably vote to grant rehearing *en banc* and there would be no need for action in this case.

case appeared to be *sui generis* insofar as treatment of gas supply is concerned. While the *Elizabethtown* decision reinforces that view, it also highlights the egregious error committed by the court of appeals in this case in requiring a nebulous inquiry into gas supply on Transco's system before deciding the merits of an issue which every other court has been able to decide without *any* inquiry into gas supply.[5]

3. Over two years ago, this Court determined that "swift and priority consideration"[6] should be given to this case by the court of appeals. Yet, if the kind of esoteric inquiry mandated by the court of appeals is now required, it is likely that another two years or more will go by before there is a decision by the court of appeals on the merits. In the meantime, there is presently being held in escrow for the benefit of one group of Transco customers or another approximately $22.5 million of compensation money (including earnings on the escrow balance) which cannot be distributed until this case is decided on its merits.

4. Under all of the foregoing circumstances, Transco respectfully urges this Court to grant the petition for certiorari, summarily reverse the latest order of the court of appeals as once again invading the rightful province of the Commission, and remand the case

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[5] See also *Mississippi Public Service Commission* v. *FPC*, 522 F. 2d 1345 (5th Cir. 1975), *rehearing denied*, 526 F. 2d 81b, *cert. denied*, 429 U.S. 870 (1976), and *Ft. Pierce Utility Authority of City of Ft. Pierce* v. *FPC*, 526 F. 2d 993 (5th Cir. 1976).

[6] *FPC* v. *Transco, supra*, 423 U.S. at 334.

to the court of appeals with directions to decide this case promptly on its merits.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1465

ELIZABETHTOWN GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

WASHINGTON GAS LIGHT COMPANY
COLUMBIA GAS TRANSMISSION CORPORATION
COLUMBIA GAS DISTRIBUTING COMPANIES
COMMONWEALTH NATURAL GAS CORPORATION
GENERAL MOTORS CORPORATION, INTERVENORS

Petition for Review of an Order of the
Federal Energy Regulatory Commission

Argued June 17, 1977

Decided January 26, 1978

Judgment entered this date ←

John T. Miller, Jr., for petitioner.

Thomas Walsh, Attorney, Federal Energy Regulatory Commission, for respondent. *Drexel D. Journey*, General Counsel, Federal Energy Regulatory Commission, *Robert W. Perdue*, Deputy General Counsel, *Allan Abbot Tuttle*,

Solicitor and *John H. Burnes, Jr.*, Attorney, Federal Energy Regulatory Commission were on the brief, for respondent. *John J. Lahey*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Stephen J. Small with whom *Tilford A. Jones* was on the brief for intervenor, Columbia Gas Distribution Companies.

Edward J. Grenier, Jr., Richard P. Noland, Robert R. Morrow, Frazer F. Hilder and *Julius Jay Hollis* were on the brief, for intervenor, General Motors Corporation.

John D. Daly, Giles D. H. Snyder, Leonard Sargeant, III, and *William P. Saviers, Jr.*, were on the brief, for intervenor, Columbia Gas Transmission Corporation.

Lewis Carroll, Monte R. Edwards and *Susan A. Low* were on the brief, for intervenor, Washington Gas Light Company.

James O. Watts, Jr., entered an appearance for intervenor, Commonwealth Natural Gas Corporation.

Before: LEVENTHAL and ROBB, *Circuit Judges* and RONALD N. DAVIES,* *Senior United States District Judge* for the District of North Dakota.

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: In this case, we rule that the Federal Power Commission has the power to require compensation as part of a curtailment plan. We remand to the Federal Energy Regulatory Commission, as the successor to the FPC,** for consideration of whether such compensation should be provided.

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* Sitting by designation pursuant to Title 28, U.S.C. § 294(d).

** See 42 U.S.C. § 7101 et seq., § 7295(c) (Supp. 1977).

The issue arises out of orders of the FPC relating to two successive interim curtailment plans for the interstate natural gas pipeline transmission system of Columbia Gas Transmission Corporation (Columbia). The appeal is by Elizabethtown Gas Co. (Elizabethtown), one of the public utilities that buys natural gas from Columbia for resale to consumers.

Elizabethtown opposed each of the plans on the ground that it unfairly failed to compensate the customers of Columbia which received less than their pro rata share of gas. The Commission approved the plans, rejecting Elizabethtown's claim on the ground that it lacked jurisdiction under the Natural Gas Act to order or approve any curtailment plan that included a compensation feature. The appeals have been consolidated.

As indicated at the outset, in our view, the Commission does have the power to require compensation as part of a curtailment plan. We remand for a determination in appropriate proceedings whether or how this power should be exercised.

I. PROCEDURAL BACKGROUND

The procedural background of these pending appeals is of considerable complexity. To aid reader understanding, we have presented that background in some detail in Appendix A to this opinion, and confine ourselves at this point to a brief statement that Elizabethtown contends that the interim curtailment plans approved by the FPC are unlawful (as constituting undue preference and for other reasons) because the plans do not provide a compensation feature, whereby purchasers who receive more than their pro rata share of gas pay a surcharge, and purchasers who receive less than their pro rata share of gas receive compensation out of the proceeds of the surcharges.

II. Commission's Authority to Employ a Compensation Provision

On the merits, these appeals pose the question whether the FPC was correct in its construction of the Natural Gas Act, when it determined that a compensation scheme is impermissible under the Act as a matter of law.

As set forth in Appendix A, the Commission's position emerged in these proceedings in the course of procedural rulings in the handling of a Columbia plan that contained a compensation feature. Columbia then dropped the compensation feature ("under duress") in the next interim plan(s) proposed to the FPC, and those interim plans were in due course approved. The FPC has rejected Elizabethtown's petitions for rehearing, which sought a compensation feature, and in doing so has relied on its opinion in the *Transco* case.[1] Another opinion and order of the Commission to similar effect has been reversed by the Fifth Circuit and certiorari has been denied. *Mississippi Public Service Commission v. FPC*, 522 F.2d 1345 (5th Cir. 1975), *cert. denied*, 45 L.W. 3254 (S.C. Oct. 4, 1976).

Although the procedural situation is complicated almost beyond belief, we find the issue on the merits to be relatively simple. In brief, we agree with the reasoning of Judge Bell in *Mississippi Public Service Commission*, and with his reliance upon the language of the Supreme Court in *FPC v. Louisiana Power and Light Company*, 406 U.S. 621 (1972).

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[1] Transcontinental Gas Pipeline Corporation, FPC Docket No. RP72-99, orders of Nov. 12, 1974 and Jan. 10, 1975. On appeal, as noted in Appendix A, this court did not reach the compensation issue, and Transcontinental has sought certiorari on the ground that this court erred in its remands, and requirements for further consideration, without ruling on the compensation issue.

In the latter case, the Court dealt with a somewhat different issue—that of the Commission's authority to regulate curtailment of direct interstate sales of natural gas—but its construction of the Act is relevant to the case at bar. In finding authority for such curtailment in the Commission's *transportation* jurisdiction, the Court noted that the Commission has broad powers to meet its responsibilities under that aspect of its jurisdiction. The Commission

> must be free, "within the ambit of [its] statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility in providing that: "The Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act . . . ." 15 U.S.C. § 717o. In applying this section, we have held that "the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968). . . .

406 U.S. at 642.

No compensation feature was involved in the curtailment plan at issue in *Louisiana Power and Light*. That case did, however, turn on an expansive view of the Commission's latitude to make "pragmatic adjustments which may be called for by particular circumstances," and the statutory grant of "necessary degree of flexibility" as necessary or appropriate to further the Congressional objective. In our view, this embraces the authority to employ a compensation feature as part of a curtailment

plan where necessary or appropriate to promote the policies of the Natural Gas Act.[2]

Implicit in the Commission's handling of the case at bar is its view that it was inconsistent to require a pur-

[2] *Cf.* Cities Service Company v. FEA, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975), *cert. denied,* 426 U.S. 947 (1975), where the court was confronted with a problem of statutory interpretation similar to that of the case at bar, arising within the same general context of the national energy crisis. In finding that the FEA had authority under § 4(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 628, as amended, 15 U.S.C. § 753(a) (1976), to promulgate the Old Oil Entitlements Program, 10 C.F.R. § 211.67, the court held that "[a] proper interpretation of the Allocation Act and its provisions requires recognition of the fact that the authority under Section 4(a) must be read together with the objectives [set forth in Section 4(b)] which the exercise of that authority is to obtain." 529 F.2d at 1022.

In Niagara Mohawk Power Corporation v. FPC, 126 U.S. App.D.C. 376, 381-83, 379 F.2d 153, 158-60 (1967), this court held, more generally, that an act that entrusts a broad subject-matter to administration by an agency should be read to provide the agency with sufficient authority to implement the purposes and policies of Congress. "[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." *Id.* at 382, 379 F.2d at 159. [Citations omitted.] We further observed that "[t]he principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice." *Id.* at 383, 379 F.2d at 160. [Citations omitted.]

chaser to provide for compensation in order to obtain rights to deliveries of natural gas when those deliveries were properly allocated to him. The Commission argues, for example, that a compensation scheme, by rewarding low priority users and penalizing high priority users, is "inconsistent with the theory and purpose of end use curtailment." (Br. at 20).

In human affairs generally our society owns a deep-seated conviction that, to use Emerson's words in the influential essay on Self-Reliance, a man should not be required to "pay for a privilege where [he has] intrinsic right." That principle does not answer the question, however; it rather bids us to focus on defining the "right" that is involved.

The decision that a system of priorities is mandated by fundamental policy considerations does not, in our view, necessarily imply that priority status should be entirely unburdened. The question of whether, and how, to provide compensation may well turn on the fairness of balancing the benefit accorded a high-priority purchaser with a charge that offsets, at least in part, the added expense imposed by a curtailment plan upon a lower-priority purchaser.[3] We do not attempt to resolve this question on the present facts. We hold, merely, that it is open to the Commission to consider employing a compensation feature.[4]

In order that the Commission may proceed, on the premise of legal authority, to consider whether and how

[3] The issue of fairness is an issue of policy for the Commission. Our function is only to consider the issue of law whether the Commission has the legal authority to implement that policy of fairness.

[4] Our opinion in State of Louisiana v. FPC, 175 U.S. App. D.C. 104, 533 F.2d 1239 (1976), is not to the contrary. We there assumed, without deciding, that the Commission had authority to impose a compensation feature as a condition upon the granting of a certificate of public convenience and necessity, but held that no showing had been made, under the peculiar facts of that case, that the public interest required compensation. 175 U.S. App. D.C. at 110, 533 F.2d at 1245.

a compensation feature should be or should have been included, we remand for further consideration by the Commission, in appropriate proceedings, of an interim curtailment plan.[5]

So ordered.[6]

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[5] We do not vacate the orders of the Commission. The Commission may conclude that those orders should be retained. Portland Cement Ass'n v. Ruckelshaus, 158 U.S.App.D.C. 308, 486 F.2d 375 (1973); Portland Cement Ass'n v. Train, 168 U.S.App.D.C. 248, 513 F.2d 506 (1975).

[6] Washington Gas Light Company filed a suggestion of mootness in No. 75-1767, based on the fact that no Columbia customer requested or took more than its pro rata share of gas during the period May 1, 1975 to October 31, 1975. (As explained in Appendix A, that is the period governed by the 1974 interim curtailment plan, as extended in time and modified to omit the compensation feature originally in Columbia's 1974 plan.)

Elizabethtown's response develops a contention that the 1974 plan, as modified, presents a live issue because its disposition affects the proper handling by the Commission of the 1975 plan.

In American Smelting and Refining Co. v. FPC, 161 U.S. App.D.C. 6, 494 F.2d 925 (1974), we held that the Commission, in remedying unjust or discriminatory rates, is required by § 5(a) of the Act to proceed in two steps, by finding, first, that an existing condition is unjust or discriminatory, and then prescribing the remedy for that condition. *Id.* at 21-22, 494 F.2d at 940-41. Under the approach there enunciated, the proponent of an existing plan would, indeed, enjoy some advantage deriving from considerations of burden of proof. But we dealt there with an existing plan; here, by contrast, the curtailment plan challenged in No. 75-1767 expired of its own force. Elizabethtown cannot, consequently, derive any procedural advantage from *American Smelting* on remand. Naturally, the Commission's findings of fact will be required to meet the substantial evidence test, and its action in settling upon a new interim curtailment plan must not be arbitrary or capricious. We believe these standards provide ample procedural protection for Elizabethtown.

The appeal in No. 75-1767 stands dismissed for mootness.

APPENDIX A: PROCEDURAL BACKGROUND

On December 15, 1971, Columbia filed with the Commission a curtailment plan providing for pro rata curtailment of large wholesale customers in the event of gas shortages. The plan included an exemption from curtailment to protect residential and commercial service, and a compensation provision to reimburse customers who might suffer greater than pro rata curtailment as a result of the exemption provision. After a period of suspension by the Commission, the plan was made effective on Columbia's motion as of April 1, 1972, and continued in effect until November 1, 1972.[1]

1972 INTERIM PLAN

On September 29, 1972, the Commission approved an interim settlement curtailment plan with similar provisions, to be effective until July 1, 1974. Under this plan, buyers who took advantage of the exemption provision to purchase more than their pro rata share of gas were subject to a surcharge on such exempt volumes of $1.65 per Mcf during the months of November through March, and 50¢ per Mcf during the months of April through October. The proceeds of this surcharge were to be used by Columbia to compensate the purchasers who, in effect, freed up the exempt volumes by receiving less than their pro rata share of gas.[2] The compensation feature was intended by Columbia to "provide[] an incentive for its customers to develop their own peak shaving facilities,

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[1] R. 360-62, 363-64, 364A, 364B.

[2] Compensation was fixed at $1.65 per Mcf of curtailment in excess of ratable curtailment during the cold-weather months, provided that the excessively curtailed buyers or their distributor customers utilized all gas supply sources available, including peak shaving—and then only to the extent that peak shaving was utilized as a result of the additional curtailment. Otherwise, conspensation during the cold weather months was at the rate of 50¢ per Mcf. Compensation during the warmer months was fixed at 50¢ per Mcf.

. . . to preclude customers from requesting exempt volumes except when actually needed to protect firm non-industrial loads, and [to] compensate[] customers providing the exempt volumes for using their own peak shaving facilities." [3]

1974 Interim Plan

On June 6, 1974, the Commission granted Columbia's motion to extend this interim curtailment plan until April 30, 1975.[4] However, on January 24, 1975, and March 25, 1975, the Commission, acting on the complaint of Washington Gas Light Company (WGL) (a customer of Columbia), issued orders reflecting a change in its appraisal of the compensation feature. While the mandate of these orders was simply to set a date for formal hearing of WGL's complaint, the Commission's language made it clear that it now regarded the compensation feature as illegal.[5]

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[3] Record at 381 (hereinafter cited as R. ——).

[4] R. 781-91.

[5] The order of January 24, 1975, noted that the Commission had concluded in its orders of November 12, 1974 and January 10, 1975, in Transcontinental Gas Pipe Line Corporation (Transco), Docket No. RP 72-99, that

> a compensation plan similar to the one now before us was unacceptable as a matter of law because it is discriminatory, fixes rates unrelated to costs, and does not comply with the filing requirements of Sections 4 and 7 of the Natural Gas Act because the transfers would involve sales. It was further concluded that the compensation plan was unacceptable as a matter of policy because of its inherent inequity. The Commission recognized, however, that its position was subject to judicial review, and provided that notwithstanding the Commission's views as to unlawfulness the plan should remain in effect as provided by the Ccurt of Appeals pending further order. Pending hearing and final decision, no change in Columbia's rates shall be effective, nor any transfer of entitlements among Columbia's customers be effectuated

> unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the Act.

R. 874, J.A. at 276. And in its order of March 25, 1975 (formally a response to Columbia's petition for clarification of, or application for rehearing of, the January 24 order) the Commission reiterated its position.

> We deny so much of the applications as seek to have us withdraw the language in the January 24, 1975, order relating to sales for resale in interstate commerce which may be attempted by Columbia's customers under the purported authority of our June 6, 1974, order approving Columbia's interim curtailment plan. We have determined that sales for resale between and among pipeline customers, even when attempted in the guise of "compensation features" of a curtailment plan, are subject to Sections 4 and 7 of the Natural Gas Act. See *Transco, supra; Northwest Pipeline Corp.*, Docket No. RP74-49, order issued February, 1975; *Consolidated Natural Gas Company*, Docket No. RP73-115, order issued January 15, 1975. We are without power to waive compliance with the statute itself; accordingly, any sales by and between Columbia's customers can lawfully be made only after compliance with the statute and regulations thereunder.
>
> We have not forbidden implementation of Columbia's interim curtailment plan; indeed we expect allocation of Columbia's supplies to be made in strict conformity therewith until expiration of the interim plan. We have attempted to make clear, however, that sales for resale among Columbia's customers are unlawful unless and until the requirements of Sections 4 and 7 have been met.

R. 895-96; J.A. at 282-83.

The *Transco* case, upon which the Commission relies in these passages, involved a curtailment plan with a compensation feature similar to that of the case at bar. The plan was filed by Transcontinental Gas Pipeline Corporation (Transco) in September 1974. The Commission found the compensation feature unlawful for reasons stated in the quoted passages of the Commission's orders in the present case. Transco sought review of the Commission's determination in this court. On August 1, 1975, another panel of this court remanded the case to the Commission for further investigation of the need

Columbia's 1974 interim curtailment plan was due to expire on April 30, 1975. On April 1, 1975, Columbia filed a motion with the Commission requesting an extension of that interim curtailment plan for six months.[6] In light of the Commission's new appraisal of the compensation provision, however, Columbia felt that it had "no alternative but to propose an extension of its interim plan as modified to exclude said compensation features." [7] Columbia expressed disagreement with the Commission's determination of illegality, but stated that it felt itself "under duress" of the Commission's orders.[8]

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for curtailment. Subsequently, the case has returned to this court twice, and the panel has twice more remanded it, Transcontinental Gas Pipe Line Corporation v. FPC, No. 74-2036 (D.C. Cir. Feb. 6, 1976) (unpublished per curiam); Transcontinental Gas Pipe Line Corporation v. FPC, No. 74-2036 (D.C. Cir. Nov. 29, 1976), without reaching the merits of the legality of the compensation provision. Following the most recent refusal of this court to decide the compensation issue, Transco sought Supreme Court review, 46 U.S.L.W. 3022 (U.S. June 17, 1977) (No. 76-1799), on the grounds that this court exceeded the proper scope of judicial review by ordering a remand to determine the "duration, shape, and causation" of the alleged gas shortage; and that the "duration, shape, and causation" of the shortage had no substantial bearing on the legality of the compensation scheme.

The Commission has suggested to the Supreme Court that it defer ruling on Transco's petition for certiorari until we decide the present case. Memorandum for the Federal Power Commission (in response to *Transco's* petition for a writ of certiorari) at 10-12, Transcontinental Gas Pipe Line Corporation v. FPC, S.Ct. No. 76-1799.

[6] The matter of a permanent curtailment plan for Columbia was still pending before the Commission, but there was no chance that the Commission could issue an order on a permanent plan to become effective before the interim plan expired.

[7] R. 898.

[8] R. 905.

By order of April 25, 1975, the Commission granted Columbia's motion to extend the 1974 interim plan, (modified to delete the compensation feature) for a six-month period ending October 31, 1975.[9] Elizabethtown's application for rehearing was denied, and it filed an appeal with this court.[10]

1975 Interim Plan

Because of continuing doubts as to when a permanent curtailment plan for Columbia would be approved, Columbia and Armco Steel Corporation presented to the Commission, on July 2, 1975, competing proposals for a new interim curtailment plan, to take effect beginning November 1, 1975. Both of these proposals effected curtailment through a system of priorities of service (ranging from high-priority residential service to low-priority large-volume industrial boiler fuel use) rather than through the pro rata cutback approach, with exemptions, employed in Columbia's earlier curtailment plans. Elizabethtown opposed both proposals because of their failure to include a compensation provision to ameliorate what Elizabethtown regarded as disproportionate allocations of shortages.

By order of October 31, 1975, the Commission prescribed Columbia's 1975 Plan as an interim curtailment plan for the period November 1, 1975 through March 31, 1976 "and thereafter subject to further order of the Commission." [11] It rejected the contentions of Elizabethtown concerning the need for a compensation provision, referring to its previously expressed views on this matter.[12]

Elizabethtown applied for rehearing on the ground, *inter alia*, that this curtailment plan created undue preferences, and lacked a compensation feature that would

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[9] R. 1054-58; J.A. at 305-09.

[10] Elizabethtown Gas Co. v. FPC, D.C. Cir. No. 75-1767.

[11] R. 21487, J.A. at 527.

[12] R. 21484, J.A. at 524A.

redress these preferences and induce the favored buyers to exercise self-help.[13]

By order of March 26, 1976, the Commission denied Elizabethtown's application for rehearing. Elizabethtown filed an appeal with this court [14] asking that the Commission be required to institute a compensation feature, retroactive to November 1, 1975.

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[13] In its application for rehearing, Elizabethtown also argued that the Commission had improperly "rejected" the interim curtailment plan that was in effect through October 31, 1971. In the view of Elizabethtown, the Commission was constrained by American Smelting and Refining Co. v. FPC, 494 F.2d 925, 940-41 (D.C. Cir. 1974), to expressly find unlawful the curtailment plan that expired on October 31, 1975, before "replacing" it with the priorities-of-service plan.

[14] Elizabethtown Gas Company v. FPC, D.C. Cir. No. 76-1465.